149 U S 304

RECORD, CASE No. 13,717.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

TERM No., 137.

JOHN NIX, JOHN W. NIX, GEORGE W. NIX, AND FRANK W. NIX, PLAINTIFFS IN ERROR,

vs.

EDWARD L. HEDDEN, COLLECTOR OF THE PORT OF NEW YORK.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED OCTOBER 10, 1889.

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INDEX.

	Original.	Print.
Writ of error	*a*	1
Clerk's certificate and return	*b*	1
Summons	1	2
Certiorari	3	2
Complaint	5	3
Bill of particulars	7	5
Answer	9	6
Minutes of trial	11	7
Judgment	12	8
Bill of exceptions	14	8
Protest	14	8
Testimony of Charles P. Woodworth	15	9
Edward C. Hazard	17	10

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	Original.	Print.
Definitions from the dictionaries	18	10
Judge's certificate to bill of exceptions	21	11
Assignment of errors	23	12
Joinder in error	25	13
Bond	27	13
Citation	29	14
Proof of service of citation	30	15

a UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the southern district of New York, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you or some of you, between John Nix, John W. Nix, George W. Nix, and Frank W. Nix, plaintiffs, and Edward L. Hedden, defendant, a manifest error hath happened, to the great damage of the said plaintiffs, as is said and appears by their complaint, we, being willing that such error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, together with this writ, so that you have the same at the said place, before the justices aforesaid, on the second Monday of October next, that, the record and proceedings aforesaid being inspected, the said justices of the Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom the United States ought to be done.

Witness the Honorable Melville Weston Fuller, Chief Justice of the Supreme Court of the United States, this 26th day of September, in the year of our Lord one thousand eight hundred and eighty-nine, and of the Independence of the United States the one hundred and fourteenth.

Seal of U.S. Circuit Court, South. Dist. New York.

JOHN A. SHIELDS,
Clerk of the Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit.

The foregoing writ is hereby allowed.

E. HENRY LACOMBE.

b [Endorsed:] E. & A. A. 865. 11485. Supreme Court of the United States. John Nix *et al.*, plaintiffs in error, *vs.* Edward L. Hedden, defendant in error. Writ of error. Albert Comstock, attorney for plaintiffs in error. Due service of a copy of the within writ of error is hereby admitted this 26th day of September, 188–. Edward Mitchell, U. S. att'y, attorney for defendant in error. U. S. circuit court. Filed Sep. 26, 1889. John A. Shields, clerk.

UNITED STATES OF AMERICA, *Southern District of New York,* } *ss:*

I, John A. Shields, clerk of the circuit court of the United States of America for the southern district of New York, in the second cir-

cuit, by virtue of the foregoing writ of error and in obedience thereto, do hereby certify that the following pages, numbered from one to thirty, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the cause of John Nix, John W. Nix, George W. Nix, and Frank W. Nix, plaintiffs in error, against Edward L. Hedden, defendant in error, as the same remain of record and on file in said office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this ninth day of October, in the year of our Lord one thousand eight hundred and eighty-nine, and of the Independence of the United States the one hundred and fourteenth.

Seal of U. S. Circuit Court, South. Dist. New York.

JOHN A. SHIELDS, *Clerk.*

1 Superior Court of the City of New York.

JOHN NIX, JOHN W. NIX, GEORGE W. NIX, and FRANK W. NIX, Plaintiff-,
against
EDWARD L. HEDDEN, Collector of the Port of New York, Defendant.
} Summons.

To the above-named defendant:

You are hereby summoned to answer the complaint in this action and to serve a copy of your answer on the plaintiffs' attorney within twenty days after the service of this summons, exclusive of the day of service, and in case of your failure to appear or answer judgment will be taken against you by default for the relief demanded in the complaint.

Dated February 4th, 1887.

ALBERT COMSTOCK,
Plaintiffs' Attorney.

Office & post-office address, No. 44 Broadway, New York city.

2 [Endorsed:] 11485. Superior court of the city of New York. John Nix *et al.*, plaintiffs, against Edward L. Hedden, collector, &c., defendant. (Copy.) Summons. Albert Comstock, plaintiffs' attorney, 44 Broadway. Due service hereof admitted this — day of ——, 1889. Rec. Feb. 4th, 1887. E. L. Hedden, per T. S. McAvoy, att'y-in-fact. Received, U. S. attorney's office, Feb. 12, 1887.

3 The President of the United States of America to the judges of the superior court of the city of New York, Greeting:

We for certain reasons being desirous that our circuit court of the United States for the southern district of New York, [L. S.] in the second circuit, shall be certified of a certain cause commenced before you against E. L. Hedden, defendant,

by John Nix *et al.*, plaintiffs, do therefore command you that the record and proceedings in the said cause you distinctly and openly send to the said circuit court, at the city of New York, on the 1 day of March, 1887, as fully and amply as the same are remaining before you, by whatever names the said parties may be called therein, together with this writ, that our said court may cause to be further done thereupon what of right ought to be done.

Witness Morrison R. Waite, Esquire, Chief Justice of the Supreme Court of the United States, the 24 day of Feb'y, in the year one thousand eight hundred and eighty-seven.

TIMOTHY GRIFFITH, *Clerk.*

STEPHEN A. WALKER,
United States Attorney, Attorney for Defendant.

4 [Endorsed:] 11485. U. S. circuit court. John Nix *et al.* *vs.* E. L. Hedden. Copy. Certiorari. Stephen A. Walker, U. S. attorney, attorney for defendant. Take notice that the within is a copy of a certiorari this day issued out of the circuit court of the United States for the southern district of New York. New York, Feb'y 24, 1887. Yours, Stephen A. Walker, U. S. attorney, attorney for defendant. To A. C., plaintiffs' attorney. Due service of a copy of the within and of the above notice is hereby admitted. New York, Feb'y 24, 1887. Albert Comstock, plaintiffs' attorney.

5 United States Circuit Court for the Southern District of New York.

JOHN NIX, JOHN W. NIX, FRANK W. NIX, and GEORGE W. NIX, Plaintiffs,
vs.
EDWARD L. HEDDEN, Collector of the Port of New York, Defendant.
} Complaint.

Plaintiffs complain:

1. That defendant was during the times hereinafter mentioned collector of customs of the United States at the port of New York.

2. That the plaintiffs were during such time partners in trade, doing business under the firm name of John Nix and Company, at New York and elsewhere, and as such duly imported and entered at the port of New York the goods described in the bill of particulars.

3. That the plaintiffs, in order to obtain said goods, were compelled to pay the defendant as such collector the sum of two thousand seven hundred and fifty dollars in excess of the lawful rate of duty on said goods and of the amount required by law.

4. That plaintiffs filed with said defendant due and timely protest in writing, upon each entry of said goods, against his decision

exacting such duty, setting forth distinctly and specifically the grounds of objection thereto.

6 —. That plaintiffs made due and timely appeal on each entry to the Secretary of the Treasury, whose decision on each appeal has been either rendered within ninety days previous to the commencement of this action or delayed more than ninety days subsequent to the date of lodging such appeal.

6. That the bill of particulars hereto annexed states for each importation separately the date of entry at the custom-house, of payment of duty in excess, of the filing of said protests, of the appeal to the Secretary of the Treasury, and of his decision thereon, if rendered, together with other particulars required by law, and is made a part hereof.

7. That said sum so exacted as aforesaid has never been repaid to plaintiffs and is still due and owing to them.

Wherefore plaintiffs demand judgment against defendant for the sum so exacted as aforesaid, with interest on the several sums named in the bill of particulars from the respective dates of payment as appear thereby, together with the costs and disbursements of this action.

ALBERT COMSTOCK,
Plaintiffs' Attorney, 44 Broadway, New York.

7 *Bill of Particulars.*

Name of importer: John Nix & Company, comprising John Nix, John W. Nix, George W. Nix, and Frank W. Nix.

Description of goods.	Whence imported.	Name of vessel.	Date of invoice.	Date of entry at custom-house.	Amount of duty illegally exacted.	Date of payment of duties in excess.	Protest filed.	Date of appeal to Secretary of the Treasury.	Date of Secretary's decision.
Tomatoes----	Hamilton --	Trinidad---	M'ch 8, 1886	M'ch 12, 1886	$250	M'ch 12, 1886	June 11, 1886	June 11, 1886	None.
" ----	" --	Trinidad---	" 22, "	" 26, "	250	" 26, "	" 11, "	" 11, "	"
" ----	" --	Trinidad---	Ap'l 8, "	Ap'l 12, "	250	Ap'l 12, "	" 11, "	" 11, "	Nov. 8, 1886.
" ----	" --	Trinidad---	" 22, "	" 26, "	250	" 26, "	" 26, "	" 26, "	" 8, "
" ----	" --	Orinoco ---	" 1, "	" 5, "	250	" 5, "	July 3, "	July 3, "	None.
" ----	" --	Orinoco ---	" 29, "	May 3, "	250	May 3, "	" 23, "	" 23, "	Feb. 4, 1887.
" ----	" --	Orinoco ---	" 15, "	Ap'l 19, "	250	Ap'l 19, "	" 27, "	" 27, "	None.
" ----	" --	Trinidad---	May 6, "	May 10, "	250	May 10, "	Aug. 12, "	Aug. 12, "	"
" ----	" --	Orinoco ---	" 13, "	" 17, "	250	" 17, "	" 28, "	" 28, "	"
" ----	" --	Trinidad---	" 20, "	" 24, "	250	" 24, "	Sept. 24, "	Sept. 24, "	"
" ----	" --	Orinoco ---	" 28, "	June 1, "	250	June 1, "	" 25, "	" 25, "	"
					2,750				

8 [Endorsed:] 11485.[3] U. S. circuit court, southern district of New York. John Nix *et al.*, plaintiff-, against Edward L. Hedden, as collector of the port of New York, defendant. Complaint and bill of particulars. Albert Comstock, plaintiffs' attorney, 44 Broadway, New York. Received, U. S. attorney'- office, Mar. 10, 1887.

9 Circuit Court of the United States for the Southern District of New York.

JOHN NIX *et al.*
versus
E. L. HEDDEN, Collector, etc. } N. S. 11485.

The defendant answers to the complaint as follows:

I. He denies that the true duty or that the true and lawful rate of duty on the goods referred to in the complaint was as stated in the complaint, and he denies that the plaintiffs were compelled to pay or did pay defendant, as collector or otherwise, the sum stated in the complaint or any sum in excess of the amount required by law as duties upon the said goods, or that any sum of money unauthorized by law was exacted as duties on said goods or otherwise, or that the same was paid in order to obtain possession of said goods.

II. He denies that the plaintiffs filed with the defendant any protest or protests, as required by section 3011 of the Revised Statutes of the United States.

III. He denies that the sum stated in the complaint or any sum is now due and owing the plaintiffs.

IV. He denies that he has any knowledge or information sufficient to form a belief as to whether the goods alleged in the complaint to have been imported at the time therein mentioned were in fact such goods as are described in the said complaint.

V. And, further answering, he alleges that no protest was filed within ten days after the ascertainment and liquidation of the duties thereon.

VI. And, further answering, he alleges that no appeal was taken to the Secretary of the Treasury within thirty days after the date of the ascertainment and liquidation of duties thereon.

VII. And, further answering, he alleges that this action was not brought within ninety days after the decision of the Secretary of the Treasury on the appeal taken from the ascertainment and liquidation of duties thereon, or within ninety days after payment of duties paid thereon after such decision.

VIII. And, further answering, he alleges that this action was brought without the decision of the Secretary of the Treasury on the appeal from the ascertainment and liquidation of duties thereon having been first had and without ninety days having elapsed from the date of such appeal.

IX. And, further answering, the defendant alleges that all moneys received by him from the plaintiffs in respect of the importations in the complaint alleged to have been made were demanded of the plaintiffs and were by the plaintiffs voluntarily paid to him in his capacity as collector of customs as and for duties due the United States on imported merchandise, and were forthwith, before the commencement of this action and before the receipt by defendant of any protest or objection on the part of the plaintiffs, paid over by the defendant, in his official capacity aforesaid, to the United States and placed beyond his control.

X. And, further answering, the defendant alleges that all moneys

received by him from the plaintiffs in respect of the importations in the complaint alleged to have been made were sums due from the plaintiffs to the United States as duties, according to the rate of duty imposed by law, upon articles of merchandise imported by plaintiffs and assessed with duty, and no other sums than duties regularly assessed and ascertained and liquidated according to law upon the plaintiffs' entry thereof were collected or received by defendant from the plaintiffs.

Wherefore defendant demands judgment that the complaint be dismissed with costs.

STEPHEN A. WALKER,
United States Attorney, Attorney for the Defendant.

10 [Endorsed:] 11485. U. S. circuit court, southern district of New York. John Nix *et al. vs.* E. L. Hedden, collector, etc. Copy. Answer. Stephen A. Walker, United States attorney, attorney for defendant. —— ——, attorneys for plaintiffs. Due service of a copy of an answer, of which the within is a copy, and of the above notice is hereby admitted. New York, Nov. 12, 1887. Albert Comstock, attorneys for plaintiffs. To A. Comstock, Esq., plaintiffs' attorney.

11 At a stated term of the circuit court of the United States of America for the southern district of New York, in the second circuit, held at the United States court-rooms, in the city of New York, on Tuesday, the 14th day of May, in the year of our Lord one thousand eight hundred and eighty-nine.

Present: The Honorable E. Henry Lacombe, circuit judge.

JOHN NIX *et al.*
vs.
EDWARD L. HEDDEN. } N. S. 11485.

Now come the plaintiffs, by Stephen G. Clarke, Esq., *his* attorney, and move the trial of this cause.

Likewise comes the defendant, by William Wickham Smith, Esq., assistant United States attorney, his attorney.

Thereupon a jury is empanelled and the cause proceeds to trial.

After hearing the evidence of the respective parties and the argument of counsel, on motion of William Wickman Smith, Esq., the jury, by direction of the court, say that they find a verdict for the defendant, and so they say all.

On motion of Stephen G. Clarke, Esq., it is ordered that the plaintiffs have a stay of sixty days within which to make and serve a case, with leave to turn the same into a bill of exceptions.

An extract from minutes.

[L. S.] JOHN A. SHIELDS, *Clerk.*

12 United States Circuit Court, Southern District of New York.

JOHN NIX & *al.*
vs.
EDWARD L. HEDDEN. } Judgment, Sept. 13th, 1889.

The issues in this action having been brought on for trial before Mr. Judge Lacombe and a jury, at a circuit court of the April term, 1889, and the issues having been tried and a verdict for the defendant having been duly rendered on the 14th day of May, 1889, and his costs having been adjusted at $48.85:

Now, on motion of Stephen A. Walker, United States attorney, for defendant, it is adjudged that the defendant have judgment against the plaintiffs upon the issues in this action, and that he recover the sum of $48.85, his taxed costs, and have execution therefor.

Judgment signed this 13th day of September, 1889.

GILBERT E. ROGERS,
Deputy Clerk.

13 [Endorsed:] 11485. United States circuit court. John Nix & *al. vs.* Edward L. Hedden. Judgment-roll. Stephen. A. Walker, United States attorney, attorney for defendant. Filed ——— —, 188-. Costs, $———. U. S. circuit court. Filed Sept 13, 1889, 4 p. m. John A. Shields, clerk.

14 United States Circuit Court, Southern District of New York.

JOHN NIX, JOHN W. NIX, GEORGE W. NIX, and FRANK W. NIX
vs.
EDWARD L. HEDDEN. } Bill of Exceptions.

Afterward and on the 14th day of May, 1889, at a stated term of this court, held in the city of New York, the issues in this case came on for trial before the Honorable E. Henry Lacombe, a judge of this court, and a jury, duly empaneled to try the issues therein.

Counsel for plaintiffs introduced evidence tending to show the importation, at the port of New York, in the year 1886, of certain tomatoes, upon which the defendant assessed and the plaintiffs paid, to get their goods, duty at the rate of 10 per centum ad valorem, amounting upon the importations in question to $266.90.

Plaintiffs claimed that the tomatoes in question were entitled to free entry, and as to each entry seasonably filed a protest, the substance of which is as follows:

"Collector of customs, New York.

"SIR: We hereby protest against your decision assessing duty at 10% ad val. on tomatoes entered by us for (cons.), the
15 ground of our objection being that said merchandise, being green fruit, should be admitted free of duty under sec. 704 of the tariff.

"We pay excess under compulsion, solely to obtain possession of our merchandise.

"Respectfully, JOHN NIX & CO.,
"By ALBERT COMSTOCK,
"*Att'y, 44 Broadway, N. Y.*"

Plaintiffs also duly appealed and in due time brought this suit.

Further to maintain the issues on the part of the plaintiffs, counsel for plaintiffs called one CHARLES P. WOODWORTH who, having been duly sworn, testified as follows:

I have been in the fruit and vegetable business for nearly thirty years. I was one of the firm of C. P. Woodworth & Company. We were wholesale and retail dealers.

Counsel for plaintiffs then read in evidence from various dictionaries as follows:

From Webster: "Fruit.—1. Whatever is produced for the enjoyment of man or animals by the processes of vegetable growth; that part of plants which contains the seed, especially the juicy, pulpy products of certain plants, covering and including their seeds, as the apple, pear, peach, berries, figs, melons, and others. 'Goodliest trees laden with fairest fruit.'" From the same dictionary
16 the definition of vegetables: "Vegetable, a noun." The first definition is the broad and general definition as to what is vegetable. 2. In a more limited sense, a plant used for culinary purposes, and cultivated in gardens, or destined for feeding cattle and sheep or other animals, as cabbage, cauliflower, turnips, potatoes, peas, beans, and the like."

Also from the Imperial Dictionary a definition of the word fruit. After giving it in a general sense, which covers everything, it says: "2nd. In a more limited sense, the reproductive product of a tree or other plants, the seed of the plants or the part that contains the seeds, as wheat, rye, oats, apples, quinces, pears, cherries, acorns, melons, etc." "3rd. In a still more limited sense, the edible succulent parts of certain plant, generally covering and including their seeds, as the apple, orange, peach, pear, lemon, cherry, grape, berries, etc.; such products collectively." Also, in the same dictionary, definition of the word vegetable: "Vegetable, a noun. 1. A plant. 2. In a more limited sense, a plant used for culinary purposes, or used for feeding cattle and sheep or other animals. Vegetables for these uses are such as are of a more soft and fleshy substance than trees and shrubs, such as cabbage, cauliflowers, turnips, potatoes, peas, beans, etc."

From Worcester, the definition of fruit: The first is very general, including whatever the earth produces. 2. "The product of a tree or plant in which the seeds are contained, or which is taken
17 for food. The seed or that which contains the seed." Now, the definition of vegetable: 2. "A plant cultivated for culinary uses or for feeding domestic animals."

Q. After hearing these definitions that have been read to you, tell us whether the term vegetable or the term fruits have any special meaning in trade and commerce different from those read.

A. Well, it does not classify all things there, but they are correct as far as they go. It does not take all kinds of fruit or vegetables; it takes a portion of them.

Being cross-examined by counsel for defendant:

I think the words fruit and vegetable have the same meaning in trade to-day that they had on the first of March, 1883. I understand that the term fruit is applied in trade only to such plants or parts of plants as contain the seeds. There are more vegetables than those in the enumeration given in Webster's Dictionary under the term vegetable, as cabbage, cauliflower, turnips, potatoes, peas, beans, and the like, probably covered by the words "and the like."

EDWARD C. HAZARD, a witness on behalf of the plaintiffs, being duly sworn, testified:

I am one of the firm of E. C. Hazard & Co., wholesale grocers, and have been in that business for about thirty years. I don't think the term fruit or the term vegetables, had, in March, 1883, and prior thereto, any special meaning in trade and commerce in
18 this country different from that which I have read here from the dictionaries.

By PLAINTIFFS' COUNSEL: I now read in evidence, if the court please, from Webster's Dictionary under word "tomato": "A plant and its fruit. The fruit, which is called also love apple, is usually of a rounded, flattened form, but often irregular in shape. It is of a bright red or yellow color and is eaten either raw or cooked."

From Worcester's Dictionary: "Tomato.—A plant of several varieties, much cultivated for its fruit; the common love apple; the fruit of the plant, which is used in various ways for food."

From the Imperial Dictionary: "Tomato.—A plant and its fruit. The plant is an annual, from two to six feet in height, and is a native of South America, but has been long ago introduced into most other warm or temperate countries, being brought to Europe early in the sixteenth century and now extensively cultivated in the south of the continent, and even to some extent in Great Britain. The fruit is fleshy, usually red or yellow and glossy, irregularly shaped and furrowed and divided into two, three, or many cells containing hairy seeds. It is called sometimes the love apple, in allusion to its supposed power of exciting the tender feelings, and it is used as a common ingredient of sauces."

Counsel for plaintiffs then rested, and counsel for defend-
19 ant read in evidence from Webster's Dictionary the definition of the word pea, as follows: "A plant and its fruit of the genus pisum, of many varieties, much cultivated for food."

Also the definition of the term egg-plant, as follows: "A plant

allied to the tomato and bearing a large, smooth fruit, shaped somewhat like an egg, used in cookery."

Also the definition, from the same dictionary, of the term cucumber, as follows: "A well-known plant and its fruit, of the genus cucumis."

Also the definition, from the same dictionary, of the term squash, as follows: "A plant and its fruit of the genus cucurbita or gourd kind."

Also, from the same dictionary, the definition of the term pepper, as follows: "A climbing plant and its fruit, of the genus piper, of which there are very numerous species."

Counsel for the defendant having rested, counsel for the plaintiffs read in evidence the definition from Webster's and Worcester's Dictionaries of the following words: Potatoes, turnips, parsnips, cauliflower, cabbage, carrots, and beans, as follows:

From Webster's.—Potatoes: "A plant and its esculent, farinaceous tuber, largely used for food and in various farinaceous preparations. It is a native of South America."

Turnip: "A cruciferous plant of the genus brassica, much
20 cultivated on account of its solid, bulbous root, which is usually in the form of a flattened sphere or a short, much-compressed cone, and is valued as an article of food."

Parsnips: "A plant of the genus pastinaca, of which one species, the common parsnip, has a white spindle-shaped root, of a pleasant aromatic flavor, much used for food; also the root itself."

Cauliflower: "A variety of brassica oleracea or cabbage, of which the enlarged flower is eaten as a delicacy."

Cabbage: "A genus of plants of different varieties, of the species Brassica oleracea, common as a garden vegetable."

Carrot: "An umbelliferous plant, having an esculent root of a reddish-yellow color."

Bean: "A well-known leguminous plant, and its seed, of many varieties, the principal species being the Faba vulgaris."

From Worcester's.—Potatoes: "A plant, Solanum tuberosum, and its esculent tubers."

Turnip: "A cruciferous plant, much cultivated for culinary purposes and for feeding cattle."

Parsnip: "A plant of the genus pastinaca, and its white, aromatic, mucilaginous, spindle-shaped, esculent root."

Cauliflower: "A fine species of cabbage, a variety of Brassica oleracea, differing little from broccoli. The part eaten is the enlarged or altered flower stalks."

Cabbage: "A genus of well-known edible plants.''

21 Carrots: "An herbaceous plant bearing an esculent root."

Bean: "A well-known edible pulse, both of the garden and the field, of many varieties."

Both sides rested, the testimony being closed. Counsel for the defendant moved the court to direct a verdict in favor of the defendant; which motion the court granted and directed the jury to find a verdict for defendant; to which ruling and direction counsel

for the plaintiffs then and there duly excepted, and the exception was duly allowed.

And inasmuch as the foregoing matters of law and fact and the several exceptions taken, made, and allowed do not appear upon the records of the trial, therefore, upon the prayer of the plaintiffs, by their counsel, said judge has signed and sealed the foregoing as and for the bill of exceptions in this case as of the 14th day of May, 1889.

E. HENRY LACOMBE.

Consented to.
STEPHEN A. WALKER, *U. S Att'y.*
ALBERT COMSTOCK, *Att'y for Pl'ff.*

(Endorsed:) No. 11485. U. S. circuit court, southern
22 dist. of New York. John Nix *et al. vs.* Edward L. Hedden.
Bill of exceptions. Albert Comstock, attorney for plaintiffs,
44 Broadway, N. Y. city. U. S. circuit court. Filed Sep. 11, 1889.
John A. Shields, clerk.

23 Supreme Court of the United States.

JOHN NIX, JOHN W. NIX, GEORGE W. NIX, and FRANK W. NIX, Plaintiffs in Error,
vs.
EDWARD L. HEDDEN, Defendant in Error.
} Assignment of Errors.

Afterwards, to wit, on the second Monday of October, in the same term, before the justices of the said court, at the Capitol, in Washington, come the said plaintiffs in error, by Albert Comstock, their attorney, and say that in the record and proceedings aforesaid there is manifest error, in this, to wit: That by the record aforesaid it appears that the judgement aforesaid, in form aforesaid given, was given for the said defendant in error against the said plaintiffs in error, whereas by the law of the land the said judgment ought to have been given for the said plaintiffs against the said defendant.

And the said plaintiffs pray that the judgment aforesaid, for the error aforesaid and other errors in the record and proceedings aforesaid, may be reversed, annulled, and altogether held for nothing, and that (they) the said plaintiffs may be restored to all things which (they) have lost by occasion of said judgment, &c.

ALBERT COMSTOCK,
Attorney for Pl'ffs in Error.

24 [Endorsed:] 11485. United States Supreme Court. John Nix *et al.*, plaintiffs in error, *vs.* Edward L. Hedden, defendant in error. Assignment of error. Albert Comstock, attorney for plaintiffs in error. Due service of a copy of the within assignment of error is hereby admitted this 26th day of September, 1889. Edward Mitchell, U. S. att'y, attorney for def't in error. Dis. circuit court. Filed Sep. 26, 1889. John A. Shields, clerk.

25 Supreme Court of the United States.

JOHN NIX *et al.*, Plaintiffs in Error,
vs
EDWARD L. HEDDEN, Defendant in Error.
} Joinder in Error.

And afterwards, to wit, on the second Monday of October, in said term, the said defendant in error, by Edward Mitchell, U. S. att'y, his attorney, comes here into court and says that there is no error, either in the record or proceedings aforesaid or in the giving of the judgment aforesaid, &c.

And he prays that the said Supreme Court, before the justices thereof now here, may proceed to examine as well the record and proceedings aforesaid as the matters aforesaid above assigned for error, and that the judgment aforesaid, in form aforesaid given, may be in all things affirmed, &c.

EDWARD MITCHELL,
U. S. Att'y, Attorney for Defendant in Error.

26 [Endorsed:] 11485. United States Supreme Court. John Nix *et al.*, plaintiffs in error, *vs.* Edward L. Hedden, defendant in error. Joinder in error. Edward Mitchell, U. S. att'y, attorney for defendant in error. Due service of a copy of the within joinder in error is hereby admitted this 26th day of Sept., 1889. Albert Comstock, attorney for plaintiff in error. To Albert Comstock, attorney for plaintiff in error. U. S. circuit court. Filed Sep. 26, 1889. John A. Shields, clerk.

27 Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit.

JOHN NIX, JOHN W. NIX, GEORGE W. NIX, and FRANK W. NIX, Plaintiffs in Error,
vs.
EDWARD L. HEDDEN, Defendant in Error.
} Bond for Damages and Costs.

Know all men by these presents that we, Edward M. Ackerson, of 50 St. Felix St., Brooklyn, New York, and Everit Brown, of 140 West 11th St., New York city, are held and firmly bound unto the above-named Edward L. Hedden in the sum of two hundred and fifty dollars, to be paid to the said Edward L. Hedden; for the payment of which, well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated the twenty-fourth day of September, in the year of our Lord one thousand eight hundred and eighty-nine.

Whereas the above-named plaintiffs in error have prosecuted their writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled suit by the judge

of the circuit court of the United States for the southern district of New York:

Now, therefore, the condition of this obligation is such that if the above-named plaintiffs in error shall prosecute their said writ of error to effect and answer all damages and costs if they fail to make their said writ of error good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

E. M. ACKERSON. [L. S.]
EVERIT BROWN. [L. S.]

Sealed and delivered and taken and acknowledged this 24th day of September, 1889, before me—

THEO. B. MOORE,
Notary Public, N. Y. Co.

28 [Endorsed:] 11485. U. S. circuit court, southern district of New York. John Nix *et al.*, pl'ffs in error, *vs.* Edward L. Hedden, def't in error. Bond for costs on writ of error. Approved as to form, amount, and sufficiency of sureties. N. Y., Sept. 26, 1889. E. Henry Lacombe. U. S. circuit court. Filed Sept. 26, 1889. John A. Shields, clerk.

UNITED STATES OF AMERICA,
Southern District of New York, } *ss:*

Edward M. Ackerson and Everit Brown, being duly sworn, do depose and say and each for himself says that he is worth the sum of five hundred dollars over and above all his just debts and liabilities.

E. M. ACKERSON.
EVERIT BROWN.

Sworn to this twenty-fourth day of Sept., A. D. 1889, before me—

THEO. B. MOORE,
Notary Public, N. Y. Co.

29 UNITED STATES OF AMERICA, *ss:*

To Edward L. Hedden, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the second Monday of October, eighteen hundred and eighty-nine, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the southern district of New York, wherein John Nix, John W. Nix, George W. Nix, and Frank W. Nix are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice should not be done to the parties on that behalf.

Dated September 26th, 1889.

E. HENRY LACOMBE.

30 [Endorsed:] E. & A. A. 865. 11485. U. S. Supreme Court. John Nix *et al.*, plaintiffs in error, against Edward L. Hedden, defendant in error. Citation. Albert Comstock, attorney for plaintiffs in error. Due service of a copy of the within citation is hereby admitted this 26th day of September, 1889. Edward Mitchell, U. S. att'y, attorney for defendant in error. U. S. circuit court. Filed Sep. 26, 1889. John A. Shields, clerk.

Endorsed on cover: Case No. 13,717. S. New York C. C. U. S. No. 137. John Nix, John W. Nix, George W. Nix, and Frank W. Nix, plaintiffs in error, *vs.* Edward L. Hedden, collector of the port of New York. Filed October 10, 1889.

Office Supreme Court U. S.
FILED.
DEC 15 1892
JAMES H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

No. 137.

JOHN NIX ET AL.

vs.

EDWARD L. HEDDEN.

PLAINTIFFS' BRIEF.

EDWIN B. SMITH,
Of Counsel,
120 Broadway, N. Y.

C. G. Burgoyne, Walker and Centre Sts. New York.

Supreme Court of the United States,

OCTOBER TERM, 1892.

JOHN NIX ET AL.

vs.

EDWARD L. HEDDEN.

No. 137.

PLAINTIFF'S BRIEF.

Statement.

The sole subject of inquiry in the cause at bar is the meaning of "*fruits*" in the "Free List" of the act of March 3, 1883, c. 121. (22 Stats. 519.)

Our claim, rejected in the Court below, is that (in default of any special trade meaning) it there bears the definition given it in every dictionary and popular encyclopædia, and (as we say) in everyday speech.

Under this tariff of 1883, tomatoes imported by plaintiffs into New York, in 1886, which should have been admitted free under this statute, as *fruits*, were treated as dutiable at ten per centum, as vegetables.

Mr. Hedden, then collector of that port, assessed these tomatoes at that rate (10%), upon that ground, and the plaintiffs protested, the statement of their "objection being that said merchandise, being green

fruit, should be admitted free of duty" under Heyl, 704. (Rec. 8 bottom.)

It was proved "that *the term 'fruit' is applied in trade only to such plants, or parts of plants, as contain the seeds.*" (Rec. 10, fol. 17.) Beyond this, there was shown to be no special meaning attaching to the word 'fruits' in trade and commerce, different from its lexicographical meaning. *(Ib.)*

The definitions given the words 'fruits' and 'vegetables,' and the word 'tomato,' in the various dictionaries were then read in evidence as follows:—(Rec. 9, 10.)

From Webster:

"Fruit.—1. Whatever is produced for the enjoyment of man or animals by the processes of vegetable growth. 2. *That part of plants which contains the seed*, especially the juicy, pulpy products of certain plants, covering and including their seeds, as the apple, pear, peach, berries, figs, melons, and others. 'Goodliest trees laden with fairest fruit.'"

From the same dictionary the definition of vegetables:

"Vegetable, a noun." (The first definition is the broad and general definition as to what is vegetable.) 2. In a more limited sense, a plant used for culinary purposes, and cultivated in gardens, or destined for feeding cattle, sheep or other animals, as cabbage, cauliflower, turnips, potatoes, peas, beans, and the like."

Also from the Imperial Dictionary a definition of the word 'fruit.' After giving it in a general sense, which covers everything, it says:

"2nd. In a more limited sense, the reproductive product of a tree or other plants, the seed of the plants or *the part that contains the seeds*, as wheat, rye, oats, apples, quinces, pears, cherries, acorns, melons, etc."

"3rd. In a still more limited sense, *the edible succulent parts of certain plants, generally covering and including their seeds*, as the apple, orange, peach, pear,

lemon, cherry, grape, berries, etc.; such products collectively."

Also, in the same dictionary, definition of the word vegetable:

"Vegetable, a noun. 1. A plant. 2. In a more limited sense, a plant *used for culinary purposes*, or used for feeding cattle and sheep or other animals. Vegetables for these uses are such as are of a more soft and fleshy substance than trees and shrubs, such as cabbage, cauliflowers, turnips, potatoes, peas, beans, etc."

From Worcester, the definition of "fruit": The first is very general, including whatever the earth produces.

"2. The product of a tree or plant *in which the seeds are contained*, or which is taken for food. The *seed* or *that which contains the seed*."

Now, the definition of vegetable:

"2. A plant cultivated *for culinary uses* or for feeding domestic animals."

From Webster's Dictionary under word "tomato":

"A plant and its fruit. The fruit, which is called also love-apple, is usually of a rounded, flattened form, but often irregular in shape. It is of a bright red or yellow color and is eaten either *raw* or cooked."

From Worcester's Dictionary:

"Tomato.—A plant of several varieties, much cultivated for its fruit; *the common love apple;* the fruit of the plant, which is used in various ways for food."

From the Imperial Dictionary:

"Tomato.—A plant and its fruit. The plant is an annual, from two to six feet in height, and is a native of South America, but has been long ago introduced into most other warm or temperate countries, being brought to Europe early in the sixteenth century and now ex-

tensively cultivated in the south of the continent, and even to some extent in Great Britain. The fruit is fleshy, usually red or yellow and glossy, irregularly shaped and furrowed and divided into two, three, or many cells containg hairy seeds. It is called sometimes the love-apple, in allusion to its supposed power of exciting the tender feelings, and it is used as a common ingredient of sauces."

Counsel for plaintiffs then rested, and counsel for defendant read in evidence from Webster's Dictionary the definition of the word pea, as follows: (Rec., 10, 11.)

"A plant and its fruit of the genus *pisum*, of many varieties, much cultivated for food."

Also the definition of the term egg-plant, as follows:

"A plant allied to the tomato and bearing a large, smooth fruit, shaped somewhat like an egg, used in cookery."

Also the definition, from the same dictionary, of the term cucumber, as follows:

"A well-known plant and its fruit, of the genus *cucumis*."

Also the definition, from the same dictionary, of the term squash, as follows:

"A plant and its fruit of the genus *cucurbita* or gourd kind."

Also, from the same dictionary, the definition of the term pepper, as follows:

"A climbing plant and its fruit, of the genus *piper*, of which there are very numerous species."

Counsel for the defendant having rested, counsel for the plaintiffs read in evidence the definition from Webster's and Worcester's Dictionaries of the following

words: Potatoes, turnips, parsnips, cauliflower, cabbage, carrot, and beans, as follows: (Rec. 11.)

From Webster's:

Potatoes: "A plant and its esculent, farinaceous tuber, largely used for food and in various farinaceous preparations. It is a native of South America."

Turnip: "A cruciferous plant of the genus *brassica* much cultivated on account of its solid, bulbous root, which is usually in the form of a flattened sphere or a short, much-compressed cone, and is valued as an article of food."

Parsnips: "A plant of the genus *pastinaca*, of which one species, the common parsnip, has a white spindle-shaped root, of a pleasant aromatic flavor, much used for food; also the root itself."

Cauliflower: "A variety of *brassica oleracea* or cabbage, of which the enlarged flower is eaten as a delicacy."

Cabbage: "A genus of plants of different varieties, of the species *Brassica oleracea*, common as a garden vegetable."

Carrot: "An umbelliferous plant, having an esculent root of a reddish-yellow color."

Bean: "A well-known leguminous plant, and its seed, of many varieties, the principal species being the *Faba vulgaris*."

From Worcester's:

Potatoes: "A plant, *Solanum tuberosum*, and its esculent tubers."

Turnip: "A cruciferous plant, much cultivated for culinary purposes and for feeding cattle."

Parsnip: "A plant of the genus *pastinaca*, and its white, aromatic, mucilaginous, spindle-shaped, esculent root."

Cauliflower: "A fine species of cabbage, a variety of *Brassica oleracea*, differing little from broccoli. The part eaten is the enlarged or altered flower stalks."

Cabbage: "A genus of well-known edible plants."

Carrots: "An herbaceous plant bearing an esculent root."

Bean: "A well-known edible pulse, both of the garden and the field, of many varieties."

Both sides rested, the testimony being closed. (Rec. 11 bot.), Counsel for the defendant moved the Court to direct a verdict in favor of the defendant; which motion the Court granted and directed the jury to find a verdict for defendant; to which ruling and direction counsel for the plaintiffs then and there duly excepted, and the exception was duly allowed. (Rec. 11, 12.)

Assignment of Errors.

The plaintiff in error assigns for error,

1. The direction given by the Court to the jury to find a verdict for the defendant. (Rec. 11 bottom.)

2. The failure to submit the cause to the jury.

3. The judgment entered in favor of the defendant, upon such directed verdict. (Rec. 8 top.)

Statutes.

The free-list of the tariff of 1883, Sec. 2503, " Sundries " includes

Fruits, green, ripe, or dried, not *specially* enumerated or provided for in this act. (22 Stats. 519.)

Schedule G, " Provisions," of the same act duties

Vegetables in their natural state, or in salt or brine, not specially enumerated or provided for in this act, ten per centum *ad valorem*. *(Id.* 504.*)*

POINTS.

The broadness of the primary, or first-given, definitions of the words 'fruit' and 'vegetables' excludes these meanings from any application to the language of the tariff.

The meaning to be adopted is that which is germane to the subject.

Dole v. N. E., 6 Allen, 386.

The statute duties 'vegetables,' and admits all unspecified 'fruits' free.

That the tomato belongs to the vegetable kingdom, and is included within the widest definition of 'vegetable,' is no more true than that it is also embraced within the broadest definition of 'fruit.' (Rec. 9, fol. 15.) But is it, in this statute, included within that word 'fruits,' which of itself embraces an infinite variety of the products of vegetation?

The tariff recognizes a distinction between a large, numberless class of edibles dutiable as 'vegetables,' and another class, equally innumerable, which are to be admitted as 'fruits';—now, what is this distinction? how is the necessary discrimination to be made? and upon which side of the discriminating line will the tomato fall?

I.

We claim that, by every distinctive attribute, by method of use, by every analogy of free or dutiable character assigned to other such edibles, by every recognized principle of statutory construction, the tomato is entitled to free admission as one of that comprehensive class of 'fruits' intended by the free list.

This leads us to observe that the inquiry is, not how it is to be looked at as the growth of our own soil, but how is it to be considered *as an importation*—even though the term employed be not technical.

U. S. v. Sugar, 8 Pet. 279.
See, also, 10 *Id.* 151 ; 96 U. S. 110.

As it comes from our own gardens, it is found, in common with the apple, pear, potato and turnip, in every grocery ; but as imported, in winter or early spring from sunnier climes, it is brought in exclusively by fruit-dealers, with the pine-apple and the mango, etc., etc.

The tomato is the product of the *garden*, and not of the field. It posesses the perishable nature of the specified fruits admitted free, and not the more lasting character of the vegetables subjected to duty.

This tendency to rapid decay precludes them from any practical competition with the products of our own gardens ; so they are merely imported from Bermuda ; to some extent, during the few weeks preceding their ripening here. The importations of plaintiffs (the principal, if not only, dealers in foreign tomatoes) aggregated but $266.90 of duty, from March 8 to June 1, 1886. (Rec. 5 ; 8 bot.)

Its peculiar *flavor* is that of a fruit, not of a vegetable.

Taste for it has to be acquired.

Describing it, the Am. Cyclopædia mentions it as a plant, "the fruit of which, possessing an *agreeable acid flavor*, is employed in various ways for the table. It is supposed to have originated in South America, and to have been early cultivated in Mexico and Peru." As garden-curiosities, they were known in 1656 in England as love-apples, etc. They are still often so called in this country, and it is their exclusive name in Italy—*pomi d'amore*. "The *fruit* is a *berry* of two and three cells, with a flat, hairy seed, enveloped in a

juicy pulp." *(Ib.)* That article enumerates several varieties, "the pear-shaped, the cherry, and the fig-tomato which, when dried, is prepared as a sweet-meat."

The Encyclopædia Britannica treats of the tomato, *inter alia*, in its article upon "*Horticulture.*" It says that, in England,

"They were formerly raised from seed sown in gentle heat in February, or early in March, potted singly into small pots, shifted into larger pots, and gradually exposed to the air until about the end of May, when, if the season was favorable, they were planted out against a wall with a southern aspect, or in the warmest situation at command. As they grew, they were nailed to the wall or otherwise supported. Only the earlier of the fruit ripened out of doors, in an average season; and when a fair quantity had set, the plants were stopped, the secondary branches being also stopped above the fruit, and the laterals removed gradually. Under these circumstances, the fruit began to ripen in August successfully coming to maturity, at which stage and when perfectly dry, it had to be gathered and hung up or laid upon shelves. The partially-ripened fruit had to be got in before it was impaired by frost, its maturation being completed in a vinery, or other heated house, and, though not acquiring the full flavor, the forwardest of these late fruits thus became usable."

Plaintiffs' first witness testified;—

"I understand that the term 'fruit' is applied *in trade* only to such plants, or *parts of plants, as contain the seeds.*" (Rec. 10, top.)

This corresponds with common usage. The American Cyclopædia defines 'fruit' as "that organ of a plant which contains the seeds." It adds;—

"The term 'fruit,' *in common language* and in horticultural books, signifies *the matured envelopes of the seeds*, such as the apple, pear, peach, *nuts*, etc.; but *in botany*, as we have seen, *the term is more extensive* and, at the same time, more natural." VII New Am. Cy. (1st ed.) 774, *h. t.*

The Legislature "did not suppose our merchants to be naturalists, or geologists, or *botanists.*" (200 chests, 9 Wheat. *438, 1 Sumn. 164.)

Yet, *in every instance*, it was the *botanical* name of the article (pea, egg-plant, cucumber, squash, pepper) that the defendant read in evidence. (Rec. 10, 11.) In Webster's Dictionary this indication *(Bot.)* precedes each definition that was read. It could not mean that the pepper of commerce is *generally* known as a fruit or a vegetable. It is a condiment; a spice. Peas, beans, etc. are not the pulpy or matured envelopes of the seeds, but the seeds themselves. The potato, carrot, etc. produce their seed upon the plant, while the *roots* are edible.

It must constantly be borne in mind, that *the statutory term to be construed is* 'FRUITS'—not tomato.

"FRUITS," in the plural, is employed, as more strongly indicative of the classes, of unnumbered and undefined varieties, being within the contemplation of Congress.

The proper definition of 'FRUITS' (as here used) *must first be established;*—then, the inquiry will be whether the tomato, or any other such non-enumerated imported edible, comes within it.

We believe it impossible to adopt any fair, reasonable, general definition of the word '*fruits*' which, when it comes to be applied, will not include the tomato.

The general definition, embracing the whole vegetable kingdom (Rec. 9, fol. 15.) is manifestly inapplicable, and must be rejected with any mere botanical definition. We have not only the dictates of common sense but the positive testimony of an expert witness that the part of plants containing the seeds is what is so known in the trade. (Rec. 10 top.) As Webster

adds, "especially the juicy, pulpy, products of certain plants, covering and including their seeds." (Rec. 9 mid.) Such are the definitions from Worcester's (2) and the Imperial (3) dictionaries. *(Ib.* fols. 16, 17.*)*

In Webster's new "International," this is the applicable meaning;—

2. *(Hort.)* The pulpy, edible seed-vessels of certain plants, especially *those grown on branches above ground*, as apples, oranges, grapes, melons, berries, etc."

The Century says;—

"An edible, succulent product of a plant, *normally covering and including the seeds*, as the apple, pear, plum, a berry, melon, etc.; in a collective sense, *such* products in the aggregate."

In its *use*, the tomato is a fruit, rather than a vegetable.

Long ago (entirely independent of this litigation and the parties to it) the New York Sun (in an item cut out and since mislaid) answered a correspondent's inquiry very emphatically, that the tomato is a fruit;—assigning as one reason for so declaring, that it was palatable uncooked as well as cooked; which, generally and practically, a vegetable is not.

Thus the lexicographers (Rec. 9), each of them, makes "culinary purposes" or "culinary uses" the test of the term 'vegetable.'

True, the tomato is often cooked, as is the apple, etc.; yet it is probable that the proportion of those eaten raw to the cooked is greater than in the case of the apple; for apple-sauce or the baked apple is more frequent than the stewed or baked tomato; and the Great American Pie-biter devours more apple-pies than all other kinds (squash included) put together.

The *method* of cooking and eating is noticeable. Corned beef and cabbage, turnips, potatoes, etc., may easily be boiled in one pot, and served upon one plate;

but the tomato, when cooked, must be by itself (just as much as apples, pears or berries) and be served in its own separate dish. Doubtless, a majority of consumers eat it with sugar, as they do berries, and as many do melons; while an epicure who would sugar his turnips or cabbage would be eccentric.

As a natural production and as comestible, in every way, the tomato ranges itself among fruits and separates itself from vegetables.

The arrangement of the tariff, and its divisions, excludes the tomato from the vegetable clause which the defendant applied to it.

Solomon v. Arthur, 102 U. S. 213 bot.

That clause is found in Schedule G of this act. (22 Stats. 504.)

In the revision was the first orderly arrangement of subjects, and the introduction of Schedules by subject; since observed in later legislation. In the Rev. Stats. (2d ed.) this vegetable clause is found in Schedule F "Provisions." (Pp. 467–8.)

That schedule has become the first part of Schedule G, "Provisions" of the Act of 1883. (22 Stats. 503–4.) Commencing with "Animals, live; beef and pork," etc., it proceeds to "wheat, rye, barley, maize, oats," and their flours and starches; coming down to "potatoes," *then this vegetable clause*, "prepared vegetables," and "vinegar"—with which the schedule terminated in the revision.

When transposed bodily into schedule G of the act of 1883, nothing new or different was intended by the language; although there was added to the enumerations of R. S. schedule F (which did not mention one article of fruity character) "acorns, chocolate, cocoa, currants, dates, plums, prunes, figs, lemons and oranges, limes and grapes, raisins, almonds, filberts, walnuts, nuts of all kinds" and, finally "mustard." (22 Sts. 503–

4.) In its relation to its antecedents, this vegetable clause should be construed as before; when, outside of grains, there was no vegetable specified but "potatoes"; and all the mentioned articles together constituted the "provisions" schedule, which implies a *storing-up* of food (see Webst. Dict.) for future use, possessing more permanency, and less perishable, than the tomato.

The association "vegetables in their natural state" with those "in salt or brine," excludes the tomato; which is not so imported, nor practically capable of it.

The meaning of 'fruits' for which we contend is seen to be that given in every dictionary and popular cyclopædia, and the sense in which it is used in common speech.

Judge LACOMBE virtually conceded this (39 Fed. Rep., 110); but denied the concession its logical result, because of his inner consciousness that the ordinary citizen in this community would be equally illogical in the application of an avowedly correct definition to the particular case in hand.

Such is not the duty of the court. It should itself apply the ascertained, general meaning of the word employed ('fruits') to the special case before it; or, if that common meaning be uncertain, leave it to the jury for decision.

Besure, the judge speaks as if the dictionary meanings cited by us were "botanical or technical"; but this is a mistake of fact, as his direction of a verdict (perhaps the consequence of this mistake) was an error of law.

As already noted, it was *in defense* alone that botanical definitions were read. The record shows we passed over the widest meaning, claiming under that which was germane.

To illustrate the judge's mistake, two instances suffice. Worcester thus defines 'Fruit.' 2. "The product of a

tree or plant in which the seeds are contained. . . . 5. *(Bot.)* " The matured ovary," etc.

' Vegetable '—1. *(Bot.)* " A living body," etc. " 2. A plant cultivated for *culinary* uses," etc.

Webster's International gives these definitions :— ' Fruit '—2. *(Hort.)* " The pulpy, edible seed vessels of certain plants, *especially those grown upon branches above ground*," etc. 3. *(Bot.)* " The ripened ovary of a flowering plant," etc. 4. *(Bot.)* " The spore-cases or conceptacles of flowerless plants," etc.

Manifestly, the impression that the definitions upon which we relied were botanical, or in any respect technical, was misleading.

Not asserting that untechnical language is always, or necessarily, to be construed according to its strict lexical definition, we suppose that this will be considered *prima facie* correct, and be adopted, where neither the context, nor kindred legislation, nor extrinsic circumstance, requires, or points to, any other meaning, or imposes any restriction. Such is the present case. In every other such instance, we find this and other courts resorting to the dictionary, in tariff and other causes.

Pa. R. R. v. Price, 96 Pa. 267.
Dole v. N. E. 6 Allen (88 Mass.) 386.
Arthur v. Moller, 97 U. S. 365.

" Referring to Webster's Dictionary—certainly, *the highest authority* on questions of this kind—we have an intelligible clue to the meaning of the word, as used in this country by our statesmen and *legislators*."

U. S. v. Irwin, 5 McLean, 183.

In the third volume of Lord Campbell's Lives of the Chief Justices, page 15, is a synopsis of Ch. Jus. HOLT'S observations upon the use of the word ' abdicate,' which he declares to be " a word of known and certain signification " derived from *dico*, etc.

" But that it is a known English word, and of *a known and certain signification* with us, I will prove to

you by the dictionary of our countryman, Minshew. . . . So I hope your Lordships will not find fault with their using a word so ancient in itself, and with such a certain signification in the vernacular tongue."

Lieber has observed (Herm. 11) there would be no such thing as understanding one another among men, if words were not used according to rules generally adopted; and it is because they are so used, and in daily conduct and life men (legislators as well as contractors) are held to mean what their words express, that systematic construction is possible.

Kent (1 Com. *462) and all later writers say ;—" The words of a statute, if of common use, are to be taken in their natural, plain, obvious signification and import."

The question then arises ;—how is this import, supposed to be so obvious, to be ascertained and declared? Assume the court to declare it; yet, when litigants disagree, there should be some authentic means of informing the judicial mind. The standard dictionaries are the appropriate source of information. They are what legislators, as well as judges, consult when in doubt.

" Our best lexicons may be referred to as *authority* for the plain, ordinary and popular, as well as the technical, sense in which words are used."

Burnam v. Banks, 45 Mo. 351.

Be it so, that the reference is to inform the mind of the Court ;—yet, when every such source of information tells one story, it must be error to consult only to disregard them. St. v. Wagner, 61 Me. 188 bot.

" Arbitrary interpretation is no interpretation at all."—

Reiser v. Wm. Tell, 39 Pa. 144.
Maxwell v. State, 40 Md. 293.
Frye v. R. R. 73 Ills. 403 top.
Hyatt v. Taylor, 42 N. Y. 261-2.

"It is not the *intention* of the legislator that constitutes the law, but *the words in which he has permitted that intention to be expressed* . . . . . for the public has a vested interest in the law as it stands," etc., etc. 84 Edb. Rev. (July '46) 117–8.

The intention of an act must be that "apparent upon its face."

Wilkinson v. Leland, 2 Pet. *662.
Pennington v. Coxe, 2 Cr. *52.
Elevated R. R., 70 N. Y. 351.
Palmer v. Thatcher, 3 Q. B. D. 353.
U. S. v. Fisher, 109 U. S. 145.

From all unprovided-for and non-enumerated vegetable products, the act segregates and excepts all classes of specified and unspecified fruits. This exception itself precludes giving the widest meaning which can be embraced within the term 'vegetable,' were it otherwise admissible;—but leaves the most comprehensive sense (germane to the subject; 6 Allen, 386) to be assigned to the word 'fruits;' according to all recognized principles of statutory construction. (2 Pars. on Contr. 5th ed. 501.)

Henderson, 14 Wall. 68 top.

As the word is not used technically, it must embrace everything in fact 'fruits,' though only dealt in by their several names, as 'mangoes,' 'alligator-pears,' etc., etc. As to the use of such terms, WOODRUFF, J., observed;—

"Another rule, therefore, becomes important in this particular case, viz;—that when general terms are used, these terms are to be taken in their ordinary and *comprehensive* meaning," etc. "That is to say, if 'piece silks' is a term of general meaning in its ordinary acceptation, and it is not shown that it is a term used in commerce to designate anything, save only that the goods are silks, then it is to be taken in its general and natural signification, to embrace *all* silks imported in the piece."

Lottimer v. Smythe, 17 Int. Rev. Rec. 13;
quoted, 96 U. S. 110 bot.

Jaffray v. Murphy, 19 *Id.* 143; cited, 96 U. S. 110 bot.
Smith v. Field, 105 U. S. 53, below mid.
Drew v. Grinnell, 115 *Id.* 481, last ¶.

We find that it is by the application of this rule, that a *hearse* has been held to come under the word 'wagon' (although in everyday conversation hardly so thought of) because within lexicographical definition of wagon. Spikes v. Burgess, 65 Wis. 431. A floating elevator, a "vessel." Hezekiah, 8 Ben. 556; and a floating theatre, also within the same term (7 N. Y. 508); and a canal-boat. (71 *Id.* 413.) 'Millet,' sugar-cane seed, held 'grain,' because within the lexical definition.

Holland v. St. 34 Ga. 457.

If this statutory word, in the connection in which it is found, is susceptible of two meanings, either of which could equally well be accepted by the Court, it is bound to adopt that most strongly against the user; and, certainly, that most favorable to the importer; since no tax or burden for the common good is to be placed upon the individual citizen, unless explicitly authorized and required by law.

U. S. v. Wigglesworth, 2 Story, 369, 374 top.
U. S. v. Morse, 3 *Id.* 87.
Ross v. Barland, 1 Pet. *667.

"Of all our statutes, those which are for the enforcement of taxes ought to be expressed with the greatest clearness and simplicity." (84 Ed. Rev., 131.) The legislator "lays his work before a public *who are entitled each to interpret it in his own favor*, and to found upon any reading that supports his own views," etc. *(Id.* 117-8.*)*

Livingston v. Arrington, 28 Ala. 427.

The principle repeatedly declared at Circuit and in State and English courts, and here in similar causes,

was recently most emphatically affirmed by this Court in a customs case; that

"duties are never imposed on the citizen upon vague or doubtful interpretation."

Hartranft v. Weigman, 121 U. S. 615 top,
citing U. S. v. Isham, 17 Wall. 504,
Powers v. Barney, 5 Blatch. 202,
Adams v. Bancroft, 3 Summ. 384,
and Gurr v. Scudds, 11 Exch. 191.
U. S. v. Watts, 1 Bond, 584.
Smith v. Waters, 25 Ind. 399.
Vicksbg. v. State, 62 Miss. 107.

The principle has been strongly enunciated, in varying language, adapted to the different circumstances of each case, by the English judges:—

"We must look to the precise words of these revenue acts, because, in some degree, they act as penalties."

Doe v. Smith, 8 Bing. 152.

DENMAN, C. J.—"The law requires *clear demonstration* that a tax is lawfully imposed." Burder v. Veley, 12 A. & E. 247.

WILDE, C. J. in Daines v. Heath, 3 C. B. *921.
Caswell v. Cook, 11 C. B. (N. S.) *637.

ELLENBOROUGH, C. J.—"I think, where the subject is to be charged with duty, the cases in which it is to attach ought to be fairly marked out; and *we should give a liberal construction to words of exception*, confining the operation of the duty."

Warrington v. Furbor, 8 East, 245.
Williams v. Sangar, 10 *Id.* 69 bot.
Oriental v. Wright, L. R. 5 Ap. 856.
Micklethwait, 11 Exch. 455 bot.

"If the Crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however within the spirit of the law the case might otherwise appear to be."

Partington v. Atty. G., L. R. 4 H. L. Cas. 122.

Declaring an import exempt, which the same act dutied and admitted free, Judge NELSON in 1864 used the language repeated in 121 U. S. 616 top.

Powers v. Barney, 5 Blatch. 203.

Three years later, a distinguished English judge (BLACKBURN) expressed a similar idea, more elaborately, and especially with a view to note the different principles of construction applicable to statutes or clauses imposing, and those exempting from, taxation.

" But then, in the one case the words are used in a statute *imposing* a duty for the purpose of raising a revenue," etc. " In the other case, the words are used for *exempting* and saving from duty," etc. " The object of the one statute was to promote commerce," etc. " . . . . In the one case, therefore, *the exemption should be liberally construed*," etc. . . .

He concludes ;—

" *The same words might mean a very different thing when put in to impose a tax from what they would mean when exempting from a tax.*"

LUSH, J. " I am of the same opinion."

Rein v. Lane, L. R. 2 Q. B. 150, 151.

Pace v. Burgess, 92 U. S. 376.

II.

It was error to direct a verdict against us. The cause should have been submitted to the jury, unless the direction was given in our favor upon the testimony. We did not ask such direction, because we felt that, *at the very least*, we were entitled to have the cause submitted to the jury, under proper instructions. The printed record now discloses that *all* the pertinent evidence supported our contention ; there being nothing intro-

duced by the collector to qualify the meaning established by us of the statutory words "fruits."

"The direction was wrong, if there was *any* evidence for the jury on the question; or if it was a question for the judge, and he ought to have decided it in favor of the plaintiff."

Ashpittel v. Seccombe, 5 Exchq. 163.

Judicial cognizance is taken of public facts, which may include the ordinary meaning of words and phrases; but the court should not assume to apply this knowledge in a manner, or with a significance, directly contrary to that indicated by every recognized authority; and where parol testimony is received to aid in the construction of the term, in the particular connection in which it is employed in the given case, the court should not direct against such testimony.

Robertson v. Solomon, 130 U. S. 415, top.
Bolclos v. Seymour, 17 C. B. (N. S.) 107.
Moore v. Garwood, 4 Exch. 681.

Whether the Judge errs in the proper construction to be given to the language of the statute in the light of proven or recognized facts, or should have left the conclusion to be drawn from the testimony to the jury, amounts practically to the same thing. The same erroneous result is reached; viz., a verdict and judgment which is not the *necessary* consequence of the evidence affecting the statute.

Mr. Woodworth, who had dealt "for nearly thirty years" (Rec. 9 top) in both fruits and vegetables testified;—

"I understand that the term 'fruit' is applied *in trade* ONLY to such plants, or parts of plants, as contain the seeds." *(Id.* 10, fol. 17.*)*

We assert the trade understanding, *as thus given*, to be identical with the ordinary definition. *(Ib.)*

If this be so, the direction should have been in favor of the plaintiff. If the meanings differed, trade nomenclature should have prevailed, and the same direction have been given. If doubt existed, whether there was any difference between the commercial meaning and that of common life, then the question should have been submitted to the jury. In any event, there was error in the course pursued. It was not a case of the application of the law to established or conceded facts.

The term to be construed and applied was not specific, but descriptive; not the one article named in our invoices, but a *class*, of which our importation was a member.

Barber v. Schell, 107 U. S. 621.

Wherever words describing a *genus* are employed in a tariff, the question whether or not *an unmentioned species* belongs to it is not a matter of mere judicial cognizance.

In the cases mentioned by Judge LACOMBE, in the oral remarks which accompanied his direction of a verdict against us (39 Fed. Rep. 110) the word construed by the court was *the word used* in the statute. In 116 U. S. 11, the question was. really, whether 'and' (between "mineral *and* bituminous") was conjunctive or disjunctive; if the former it did not include 'iron ore;' if the latter, it did include it. The Morrison case, 96 U. S. 108, the construction was of a *commercial* term; and the issue was presented upon *demurrer*.

In the case at bar, the Judge should have first defined "fruits," to ascertain if our article came within *that definition;* and if it *can* be considered doubtful what the result would be—whether ordinary or trade meaning be applied—that doubt should have been solved by the jury. This is what he did with reference to the word "toys," as sought to be applied to decorated mugs.

Maddock v. Magone, 41 F. R. 882.

Thus was it ascertained whether articles invariably bought and sold as 'torchons' were included within the statutory *class* 'thread laces.'

Smith v. Field, 105 U. S. 53.

Whether resorcine red, etc., is an aniline dye, *irrespective of commercial understanding.*

Pickhardt v. Merritt, 132 *Id.* 252.

It must be so determined whether an import is a "similar" preparation to gelatine; whether "fish" includes the oyster and the clam (58 Me. 164); and whether goods are "of like description" to delaines.

Greenleaf v. Goodrich, 101 *Id.* 283.

"Fruits" is employed, in the plural; indicating, more decidedly than the singular would, the comprehensive sense in which the word was to be taken.

We can conceive of no correct definition of 'fruits,' broad enough to include the apple, berries, the currant, the grape and the melon, which must not, *ex necessitate*, also include the tomato.

It is a question of *classification.* Congress intended the word to embrace everything properly classified, in any thoughtful classificatory arrangement, as a fruit, regardless of its condition ("green, ripe or dried") and of peculiar characteristics constituting individuality.

III.

"Uncertainty and ambiguity are the bane of commerce";—Merritt v. Welsh, 104 U. S., 702, top;—and these may be introduced by any variation in the rule of construction applied by the Court, as disastrously as by cloudiness in the terminology of the statute.

A grant is construed favorably to the granting power (144 U. S. 561 bottom); but, on the contrary, it is uniformly and repeatedly declared (of which we have already cited numerous instances) that when a court is called upon to construe a tax-law, the task must be undertaken with a mind inclined in favor of the citizen, construing every phase most favorably to him, and adversely to the government; and, even then, if a doubt as to the intended meaning still lingers in the judicial breast, it must turn the scale in favor of the tax-payer; since "*duties are never to be imposed upon the citizens upon doubtful interpretations.*" To doubt is to decide in favor of the citizen.

Hartranft vs. Weigmann, 121 U. S. 616, and authorities *passim*. *(Ante*, pp. 17 to 19*)*.

Because this idea rises instinctively in the legislative mind, we find the dutying clauses of a tariff deals much more commonly with, or first recites, specifications and particulars; while those granting exemption are more often couched in general expressions, covering large classes of articles.

Of this, many illustrations might be given. It will suffice to refer to the duty upon fruits; where we find currants, dates, figs, oranges, lemons, limes, grapes, raisins, almonds, peanuts, etc., etc., at varying rates; regard being had to condition; those preserved in sugar paying nearly as much again as those preserved in their own juice, etc., etc. (22 Stats. 504.) We search the 'Free List' in vain for the specification of a single fruit. *(Id.* 514 to 522.*)* All *specified* fruits are dutiable; like the grape and raisin, etc.; while *all* others, "*not* specially enumerated or provided for in this act" are entitled to free entry as "fruits, green, ripe, or dried"—under the clause of which we claim the benefit. *(Id.* 519.*)*

This is legislative recognition of the rule that exac-

tions are to be restrictively, and exemptions comprehensively, construed.

If, then, two constructions of this exempting clause be possible—and it can hardly be denied that the lexical support of that for which we contend is uniform—we are entitled to found upon that reading which supports our views, and to expect that, conformably to the principle we are now considering (and that uniformity of its application may be attained) the construction most favorable to us will be the one adopted by the Court; it being also the most comprehensive.

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Of Counsel.

Office Supreme Court U. S.
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Supreme Court of the United States.

OCTOBER TERM, 1892.

JOHN NIX ET AL., PLAINTIFFS IN ERROR,
vs.
EDWARD L. HEDDEN, LATE COLLECTOR, ETC. } No. 137.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR THE DEFENDANT IN ERROR.

WM. A. MAURY,
Assistant Attorney-General.

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BRIEF FOR THE DEFENDANT IN ERROR.

This case arises upon divers importations of tomatoes made in the months of March, April, May, and June, in the year 1886.

The collector classified the merchandise as "*vegetables*" under Schedule G of the tariff act of March 3, 1883, chapter 121 (22 Stat., 504), and assessed duty at the rate of 10 *per centum ad valorem* against the protest of the importers, who claimed that the merchandise in question should be admitted to *free entry* as "*fruits*," according to the following provision of the free list (*ib.*, p. 519): "*Fruits, green, ripe, or dried,* not specially enumerated or provided for in this act."

The learned judge (Lacomb), seeing nothing to support the plaintiff's claim to recover back the duty assessed

and collected, instructed the jury to return a verdict for the defendant.

The propriety of that direction is the question involved in this writ of error.

ARGUMENT.

There is nothing in the definitions that are quoted by the plaintiffs in error that is in any way inconsistent with the action of the collector and the court below, for when it is said that fruit is the edible succulent part of certain plants, generally covering and including their seeds, to take one of the definitions relied on by the importers, it is inconsequent to infer that the tomato is a fruit, because it holds a similar relation to its plant. The fact that all fruits hold the relation mentioned to the plant that produces them is no argument that other products holding the same relation may not be *vegetables*. The reasoning on the other side, thrown into a syllogism, is: All fruits are the edible succulent parts of certain plants, generally covering and including their seeds; the tomato is the edible succulent part of a certain plant, covering and including its seed: therefore, the tomato is a fruit.

Let us take another syllogism having the same fallacy to make the matter clearer: Animals that cleave the hoof are ruminant; swine cleave the hoof, therefore swine are ruminant.

It is the fallacy of the undistributed middle term.

Distribute the middle term of these syllogisms and the reasoning on the other side would be sound, thus: None but fruits have an edible succulent part covering and

including their seeds: The tomato has an edible succulent part, etc., therefore the tomato is a fruit; and none but ruminant animals cleave the hoof; swine cleave the hoof, therefore swine are ruminants. These conclusions follow from the premises, however false in point of fact, logic having nothing to do with the truth or falsity of the premises of the syllogism.

We come now to the plainly inadequate definition of vegetable, namely: "a plant used for *culinary* purposes." It is said that the tomato is not so much cultivated for a culinary purpose as the apple, but that the main purpose of each is not culinary. We affirm that the main purpose of the tomato *is culinary*, and that it is but for a small part of the year that it can be generally eaten raw.

The definition of *vegetable* given in the Century Dictionary is adequate and satisfactory, namely:

> A herbaceous plant used wholly *or in part* for culinary purposes, or for feeding cattle, sheep, or other animals, as cabbage, cauliflower, turnips, potatoes, spinach, pease, and beans. The whole plant may be so used, or its tops or leaves, or its roots, tubers, etc., or its fruit or seed.

And hence the same authority defines the tomato as "the fruit of a garden vegetable," a definition, by the way, which seems to have eluded the research of the learned counsel for the plaintiffs in error.

The tariff commission of the year 1882 published, as part of the testimony laid before them, a communication from Mr. H. Bonzano, of New Orleans, which has an important bearing upon the question before the court. We extract from it the following:

> I take the liberty of representing to the Commission, in the interest of the importers of green fruit, that the present tariff, Schedule M, section 1281, provides that "no allowance shall be made for loss or decay on the

voyage, unless the loss shall exceed 25 per centum of the quantity, and the allowance then made shall be only for the amount of loss in excess of the 25 per centum of the whole quantity." This proviso applies to importation of oranges, lemons, pineapples, grapes, limes, bananas, plantains, shaddocks, and mangoes, the most perishable of all imported merchandise. Partial relief from an oppressive mode of interpretation of this law has been obtained through an opinion furnished by the Attorney-General, Hon. Wayne MacVeagh, adopted by the Department of the Treasury August 30, 1881 (Synopsis of Decisions, 4990); but it is but fair to represent and urge upon the Commission that full relief should be granted; that the allowance for damage on the voyage of importation on this class of merchandise should be for "actual damage," the same as is allowed on all other merchandise, perishable articles, *such as potatoes, tomatoes, and other green or fresh vegetables included*, and the restriction that no allowance shall be made for loss unless such loss be for and in excess of 25 per cent should, in justice to this class of importers, be done away with. (p. 2451.)

With such evidence before them as to the proper classification of tomatoes, we may safely assume that if it had been the intention to admit them free of duty Congress could hardly have expected them to be classified as fruits, but would have exempted them by name.

The extract from the report of the evidence before the Tariff Commission may be properly followed by the direction to the jury of the learned judge below. He said:

In *Marrel* v. *Merritt* (116 U. S., 11, 6 Sup. Ct. Rep., 207) the principle is laid down that where the words used in a tariff act are not technical, either as having a special sense by commercial usage, or as having a scientific meaning different from their common meaning, they are the words of common speech, and as such their interpretation is within the judicial knowledge, and therefore matter of law. That case was one touching minerals, and the same rule must apply to vegetables. In *Arthur* v. *Morrison* (96 U. S., 108) the proposition is laid down that when the legislature adopts such language to define and promulgate their action, the just conclusion must be that they not only themselves comprehend the meaning of the language, but choose it with regard to those for whom it is designed to constitute a rule of commerce, namely, the community at large. The community at large, of course, are the people of the United States.

In the absence, however, of any evidence tending to show a different acceptation of words elsewhere than what we find in the community residing in this particular district, or of any knowledge on the part of the court that there is such different acceptation, it will be assumed that the use of the words is the same throughout the community at large. With regard to this particular community, the word "vegetable," in its popular

and received meaning, is used to cover a class of articles which includes tomatoes, and the word "fruit," irrespective of what the dictionaries may lay down as to its botanical or technical meaning, is not in common speech used to cover tomatoes. For these reasons I shall direct a verdict in favor of the defendant (39 Fed. Rep., 110).

Certainly courts of justice may be expected to take judicial notice of the meaning of terms in common use. As this court said in *King* v. *Gallun* (109 U. S., pp. 100, 101), "we are not required to shut our eyes to matters of common knowledge or things in common use." (See also *Brown* v. *Piper*, 91 U. S., 37, 42.)

The plaintiffs are endeavoring to escape taxation under the terms of an exception in the tariff, and their effort should not succeed if, by any reasonable intendment, tomatoes can be brought within the term "*vegetables*."

It is to be remarked further, that as the ruling of Judge Lacombe in this case was made on May 14, 1889, the reproduction of the exact language of the tariff of 1883 in the tariff of October 1, 1890, exempting fruits from duty may be properly taken as an acquiescence in that ruling. Certainly, the intelligent framers of the tariff of 1890 must have known of this ruling, made some fourteen months before the approval of that act.

It is submitted that the judgment seems to be free from error.

WM. A. MAURY,
Assistant Attorney-General.